SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ALBERT J. ADAMS,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants-in-Error.

No. 504.

Brief of Defendants-in-Error.

Statement.

This is a writ of error to the Supreme Court of the State of New York to review a judgment of that Court convicting the defendant of the crime of having in his possession certain gambling paraphernalia used in the game commonly known as policy, in violation of Section 344a of the Penal Code of said State.

The judgment of conviction was entered in the Supreme Court of the State of New York on the 21st day of April, 1903, after a trial before one of the Justices thereof and a jury (p. 5).* From this judgment of conviction an appeal was taken to the Appellate Division of the said Supreme Court, and upon the affirmance of the judgment by that Court

* The references are to the page numbers at the top of the pages in the transcript of record.

(p. 109), a further appeal was taken to the Court of Appeals, where the order of the Appellate Division was affirmed (pp. 111, 112). Thereafter, and on the 17th day of November, 1903, an order was duly made by the Supreme Court, directing that the judgment and order of the Court of Appeals be made the judgment of that Court, and that the judgment of conviction be enforced and carried into execution and effect. And thereafter, and on the 20th of November, 1903, Mr. Justice Peckham allowed the writ of error herein.

The Statutes.

The provision of the Code under which the conviction herein was had is as follows:

"SECT. 344a.—KEEPING PLACE TO PLAY POLICY.—A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies', or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy', or for any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; *or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy'*, or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery, *or any paper, print, writing, numbers, device, policy slip or article of any kind such as is commonly used in carrying on, promoting, or playing the game commonly called 'policy'*; or who is the owner, agent, superintendent, janitor or caretaker of any place, building or room where policy play-

ing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists or abets in any manner, in any of the offences, acts or matters herein named, is a common gambler and punishable by imprisonment for not more than two years, and in the discretion of the Court, by a fine not exceeding one thousand dollars, or both."

A further provision of law relating to the foregoing, and necessary to an intelligent understanding of the questions sought to be raised herein, is the following:

"SEC. 344b. POSSESSION OF POLICY SLIP, ETC., PRESUMPTIVE EVIDENCE.—The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy', or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy', is presumptive evidence of possession thereof knowingly and in violation of the provisions of Section three hundred and forty-four a."

The Facts.

On the 12th day of December, 1901, the defendant (plaintiff-in-error) had in his possession a large number of documents of a character forbidden by this statute. The documents were found in a room purporting to be the defendant's private office, and were seized by officers of the law purporting to act under a search warrant. At the time of the seizure of these papers, there were seized also certain of the defend-

ant's private papers and documents, and these private papers and documents, as well as the papers relating to the game of policy, were introduced in evidence upon the trial, and were part of the proof upon which the defendant's conviction was had.

The use of these papers and the character of the statutes above set forth constitute the errors assigned in this Court.

In order to an intelligent understanding of the nature of the statute under which this conviction was had, and of the questions sought to be raised in this Court, some description of the game of policy and of the method in which it was conducted is essential.

It appears that a play at policy consists of an attempt to guess whether one or more of a series of numbers mentioned by the player will be included in a list of thirteen of the numerals from 1-78 which are drawn, or are supposed to be drawn, daily, at the "headquarters" of the policy ring (p. 55). These plays were made at various saloons and stores throughout the city, presided over by "writers" connected with the "ring" (p. 55). When a play was made it was the uniform custom of the policy writer to enter the play on a series of "manifold sheets" of a certain size (p. 55). The entry consisted of the numbers chosen by the player written in a row, *e. g.*, 4–11–44, and after the number a figure indicating the amount staked by the player (p. 55). Thus, assuming the play to be for five cents, the entry would be "4–11–44/5" (see Policy Manifold Sheets reproduced in the record following p. 106). At the time that these numbers were entered on the sheet they were recorded by the process of manifolding on a small card the size of a visiting card, which was given to the player (p. 55, 56).

The drawings took place morning and evening

(pp. 55, 56). In the morning drawing twelve numbers were drawn; in the afternoon, thirteen (p. 55). These drawings were sent out from "headquarters" to the various shops on slips (p. 20). If the series of numbers chosen by the player appeared in the drawing he won, and immediately received 100 times his stake from the writer. If it did not appear, he lost (pp. 20, 21, 55).

The scheme is thus essentially the same as that considered by this Court in

Lottery Case, 188 U. S., 321, see p. 377.

It is obvious that to carry on a system of this kind, where a large number of persons must necessarily keep a running account with the central headquarters, and where there were so many opportunities of collusion and trickery, on the part of the writers, there must be some system of duplicate or triplicate records of plays *as made*, one to be retained by the player, one to be retained by the "writer" and one to be sent to headquarters either before the drawing or at all events before the announcement. This was apparently the purpose of the manifold "books" upon which, as may be seen by the *fac simile* printed in the record, were entered in columns and without intervals the plays as made. It is obvious further that no great number of these manifold sheets would be expected to be found except in the hands of some one intimately connected with the proprietorship of the whole scheme.

On the 12th of December, 1901, certain police officials, armed with a search warrant, entered the defendant's office, and instituted a search for policy paraphernalia proscribed by the statute. The defendant, who was present, immediately asserted that the office was not his, and that they would attach anything therein contained at their peril (pp. 13, 57, 61). The office was then ransacked, and the defendant was placed under arrest (pp. 14, 29, 58).

The papers thus seized included about thirty-five hundred of the manifold sheets above described, separated into parcels, some of which were endorsed with dates suggesting the time of the drawing (pp. 56, 64) and Policy Manifolds as reproduced in the record following p. 106), and corresponding in their identifying marks with an account in defendant's handwriting (p. 72) found in a tin box in defendant's office (Exhibit 53), in such manner as to leave no room for doubt that the defendant was in some way connected with the persons interested in the financial results of the various shops.

There was also seized at that time a large number of private papers unrelated to the game of policy.

Upon the trial, the manifold sheets were admitted in evidence to establish the *corpus delicti*, and the private papers unrelated to the game itself were received to establish the defendant's proprietary interest in the proscribed articles, and his knowledge both of their character and that they were in his possession.

POINT I.

The admission in evidence of the defendant's private papers, does not present a Federal question, even though it be assumed that it involved an unreasonable search or seizure, or that it compelled the defendant to become a witness against himself in a criminal case.

The first error assigned is that the admission in

evidence of the private papers unrelated to the game of policy which were seized upon the raid, violated the defendant's constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures; and infringed his constitutional privilege in compelling him to be a witness against himself, in a criminal case.

This right and privilege are asserted under the fourth, fifth and fourteenth amendments to the Federal Constitution. But clearly these provisions of our fundamental law have no application to the question. The Constitution contains no guarantee against a resort to unreasonable searches and seizures by the State Governments, or against compulsory self-incrimination in the State courts.

That the fourth and fifth amendments to the Federal Constitution do not *ex proprio vigore* operate as limitations upon the powers of the several States, and that nothing contained in those amendments would affect the validity of a State statute concededly compelling a person to be a witness against himself in a criminal case, or avowedly authorizing unreasonable searches and seizures, is, we take it, settled beyond question.

Thorington v. *Montgomery*, 147 U. S., 490, 492.

Brown v. *New Jersey*, 175 U. S., 172, p. 174.

Maxwell v. *Dow*, 176 U. S., 581.

And the theory that the fourteenth amendment changed radically the relation of the Federal Government to that of the States and to the people, and that it extended to the State Governments the restrictions imposed upon the power of the Federal Government by the first ten amendments, has long since been exploded in this Court.

Hurtado v. *California*, 110 U. S., 516.

In re Kemmler, 136 U. S., 436, 448.

Maxwell v. *Dow*, 176 U. S., 581.

In answer to the suggestion that it had such effect it has been pointed out by this Court that the privileges and immunities which that amendment guaranteed against invasion by the States are the privileges and immunities which are derived from Federal citizenship, as distinguished from those derived from citizenship in the State, and that even a right which from the viewpoint of the history of Anglo-Saxon institutions is so fundamental, as that of exemption from prosecution for an infamous crime save by indictment of a Grand Jury, or that of trial for such crime by a common law jury of twelve, was left at the discretion of the State Government.

> "It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the States cannot provide for any procedure in State Courts which could not be followed in a Federal Court because of the limitations contained in those amendments." * * *
>
> "It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions the entire domain of the privileges and immunities of citizens of the States, as above defined,

lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiff in error be sound."

* * *

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

Maxwell v. *Dow*, *176 U. S.*, *581*, *at 587*, *589*, *590*.

And manifestly, we submit, if the right of trial by jury is not guaranteed as one of the privileges or immunities of a citizen of the United States, or as an element of due process of law, there can be no basis for including within that guarantee either the exemption from unlawful search and seizure or from compulsory self-incrimination.

POINT II.

Even if it were assumed that the provisions of the Federal Constitution prohibited the State of New York to authorize an unreasonable search or seizure, or to compel a person to be a witness against himself in a criminal case, the reception in evidence of the papers seized upon the raid of December 12, 1901, would not constitute an invasion of the rights thus guaranteed.

That it was lawful to seize and introduce in evidence against the defendant the manifold sheets themselves, and that this neither constituted an unreasonable search nor compelled the defendant to be a witness against himself is, of course, beyond controversy.

Boyd v. *U. S.*, 116 U. S., 616, 623.
Lawton v. *Steele*, 152 U. S., 133, 140.

And the plaintiff in error himself tacitly concedes this to be so by limiting his complaint to the admission in evidence of his "private" papers seized at the same time (see Assignment of Errors p. 121).

As to these he asserts both that the seizure was unreasonable and that their admission in evidence compelled him to be a witness against himself.

The latter contention, we conceive, merits but slight consideration. Authority apart, the logic must be ingenious which, while conceding that it does not involve compulsory self-incrimination to seize and put in evidence that which is the gravamen of an offense, still seeks to establish that it

does involve such incrimination to seize and put in evidence that which merely tends to establish some link in the chain of evidence.

But upon authority it is clear that the constitutional provision in question had no such purpose.

A forcible illustration of the purposes and limitations of the constitutional provision is furnished in several decisions of the New York Court of Appeals.

It is well settled in that Court that the constitutional provision which exempts a person from the obligation of becoming a witness against himself in a criminal case is not to be extended so as to prevent the use of papers or documents forcibly taken from his possession which may tend to assist in his conviction of crime.

People v. *Gardner*, 144 N. Y., 119.
People v. *Van Wormer*, 175 N. Y., 188, 195.

In the Gardner case the Court, in discussing this constitutional provision, said :

> "The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declaration of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt" (p. 128).

In the Van Wormer case, carrying the principle thus laid down to its legal conclusion, it was held that it was not violative of any constitutional right forcibly *to take from a prisoner the shoes he had worn upon the night of the commission of the offense and to compare them with the foot prints*, and thus through the use of these articles forcibly taken from the defendant to assist in bringing about his conviction.

It is submitted that that ruling, if sound, is conclusive of the question at issue in the case at bar; for in that case, as in this, articles which in themselves were not contraband were taken forcibly from the possession of the defendant and were used as a connecting link in the chain of evidence to bring about his conviction, and the ruling which sustains the admissibility of the evidence received in the Van Wormer case of necessity establishes the propriety of the evidence received in this case.

Had the papers admitted in evidence herein been taken from the *person* of the defendant instead of from his desk, and his trunk, and his tin boxes, there could be no question as to the rightfulness of the seizure or of the propriety of their introduction in evidence under the decision in the Van Wormer case. And it is submitted that it is impossible to base any logical distinction on the fact that the articles admitted in evidence were found not on his person but in his room.

The contention that *the introduction in evidence* of these papers constitutes an invasion of the constitutional provision against unreasonable search or seizure also involves a confusion of ideas.

It may be that the seizure of the private papers was unlawful and that the search therefor was unreasonable; but, even if this were conceded, its effect would be limited to the unlawfulness of *that* act. It would result from such concession, that the officers who made the seizure were subject to pros-

ecution, civil or criminal, and that any statute which purported to justify their act or limit their liability must be conceded to be unconstitutional. But it cannot result therefrom that the defendant shall be entitled to the exclusion of the evidence there obtained upon a proceeding brought to punish him for his crime.

It is well settled that the law does not concern itself with the method whereby a criminal is brought to the bar, or, with some slight exceptions, with the means whereby evidence against him has been obtained.

Greenleaf on Evidence, Vol. 1, Sec. 254a.
Gindrat *v.* People, 138 Ill., 103.
Commonwealth *v.* Tibbetts, 157 Mass., 519.
State *v.* Van Tassel, 103 Iowa, 6.
Chastang *v.* State, 83 Ala., 29.
Starchman *v.* State, 62 Ark., 538.
State *v.* Flynn, 36 N. H., 64.
Shields *v.* State, 104 Ala., 35.
State *v.* Atkinson, 40 S. C., 363.
Williams *v.* State, 100 Ga., 511.
State *v.* Kaub, 15 Mo. App., 433.
Ruloff *v.* People, 45 N. Y., 213.

The rule is laid down in Greenleaf as follows:

"SECTION 254a. It may be mentioned in "this place that though papers and other sub-"jects of evidence may have been illegally "taken from the possession of the party against "whom they are offered or otherwise unlaw-"fully obtained, this is no valid objection to "their admissibility if they are pertinent to "the issue. The Court will not take notice "how they were obtained, whether lawfully "or unlawfully, nor will it form an issue to de-"termine that question."

This rule will be found to be sustained by the authorities in a large number of States of the Union, and, as far as we can find, to have been contested nowhere. Thus

Gindrat vs. *The People of the State of Illinois*, 138 Ill., 103.

On the trial for the larceny of a diamond ring the proof showed that the defendants came into a jewelry store and examined some rings, but left without purchasing. Directly afterward a diamond ring was found missing from the tray, and a cheap imitation ring was found in its place. The supposed thieves were followed and arrested, and the stolen ring was found near where they were overtaken.

In their possession, in a valise at their room, were found *by a detective who had no warrant to make the search, other similar imitation diamond rings, which the Court admitted in evidence*, and it was held that they were properly admitted.

The Court said :

" It is perfectly manifest, then, that there " was no legal justification for the searching of " the rooms and the seizure of the jewelry. " The acts of De Sell (the detective) were in vio- " lation of the rights of plaintiffs-in-error, and " a trespass, for which they may hold him " legally accountable in a civil action, but what " bearing does that have on the case at bar? " Does the fact that De Sell gained knowledge " of the facts in respect to which he testifies, " by the commission of a trespass, prevent the " State from having the benefit of such facts? " (After examining some authorities, notably Commonwealth *vs.* Dana, 2 Metcalf, 329, the Court proceeded as follows, at page 111): " We think that the cases last cited as well as " the present case, are *clearly distinguishable* " *from Boyd* vs. *United States.* In the " latter case the unconstitutional and erroneous

"order, process and procedure of the trial "Court compelled the claimants to produce "evidence against themselves, and such order, "process and procedure were also held to be "tantamount to an unreasonable search and "seizure, while here and in the other cases "cited the question of illegality was raised "collaterally, and the Courts exercised no "compulsion whatever to procure evidence "from the defendants, and neither made "orders nor issued process authorizing or pur-"porting to authorize a search of premises or "a seizure of property or papers, but simply "admitted evidence which was offered, with-"out stopping to inquire whether possession "of it had been obtained lawfully or unlaw-"fully. Courts, in the administration of the "criminal law, are not accustomed to be over-"sensitive in regard to the sources from "which evidence comes, and will avail them-"selves of all evidence that is competent and "pertinent and not subversive of some consti-"tutional or legal right" (pp. 110 and 111). (italics ours).

Commonwealth vs. *Tibbetts*, 157 Mass., 519.

The defendant, a woman was indicted and tried for the crime of an attempt to procure an abortion, and upon the trial certain instruments, namely, a vaginal speculum, a glass syringe, a steel needle and a tin quart measure, were offered and received in evidence against her. These instruments, shown by competent testimony to be well adapted to the production of an abortion, were taken by one Tower, a police officer, from the defendant's house *at a time when he went there with a search warrant calling for a search for intoxicating liquors in the premises of the defendant's husband*, and on the same trial one Ashport, another police officer, produced *two letters*, which were also received in evidence, as tending to connect the defendant

with the commission of the crime charged, though this officer *also testified that he took the letters at a time when he was searching the premises of the defendant's husband for intoxicating liquors.* The Court said :

> " But two points have been argued. The " first is that the criminatory articles and let- " ters found by the officer in the defendant's " possession were not admissible in evidence " because the officer had no warrant to search " for them, and his only authority was under " a warrant to search her husband's premises " for intoxicating liquors. The defendant con- " tends that under such circumstances the " finding of criminatory articles or papers " can only be proved when by express pro- " vision of statute the possession of them is " itself made criminal. This ground of dis- " tinction is untenable. Evidence which is " pertinent to the issue is admissible, although " it may have been procured in an irregular or " even in an illegal manner. A trespasser " may testify to pertinent facts observed by " him, or may put in evidence pertinent arti- " cles or papers found by him while tresspass- " ing. For the trespass he may be held re- " sponsible civilly, and perhaps criminally, " but his testimony is not thereby rendered " incompetent."

So in

Commonwealth vs. *Brown*, 121 Mass., 69,

certain surgical instruments and a speculum chair, found in defendant's house, were exhibited to the jury and received in evidence against her on a trial for an attempt to procure an abortion.

In

State vs. *Van Tassel*, 103 Iowa, p. 6,

on the trial of the defendant for murdering his wife by poisoning her, letters signed by the

defendant taken from a bureau, not under lock and key, which the defendant had moved to the home of his wife's parents and directed his mother-in-law to give to his child, and a bond found in the house of his father-in-law, and not taken from a locked drawer, were admitted as a standard of comparison for the purpose of determining the genuineness of the defendant's signature to an alleged confession, *notwithstanding an objection that they were taken surreptitiously and that he was thus compelled to give evidence against himself.*

Chastang v. *The State*, 83 Ala., 29.

The defendant was indicted and tried for carrying concealed weapons. The charge was made in consequence of what occurred when two officers attempted to arrest him on *another* charge. When he was arrested, his pockets were searched and the pistol in question found and seized. It was held that this was properly received in evidence against him, though the weapon was taken by compulsion; and in *commenting on the Boyd case* the Court said, at page 30:

> "The order of the Court required the defendant to produce in evidence againt himself a strictly private paper or document, under the penalty, if he disobeyed the order, of having the imputed contents of the alleged document treated as confessed by him. This it was held was compelling the accused to furnish evidence against himself.
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> "In the present case the defendant was required to produce nothing, to testify to nothing, and no presumption was indulged against him, as a penalty for his failure to comply with any order of Court. If our statute had provided that, under an indictment for carrying a weapon concealed about his person, the defendant might, under the order of the Court, be required to produce the alleged weapon and on failure to comply, the presumption would be

indulged that he had such weapon concealed about his person, then the defendant would be required to furnish evidence against himself. Then we would have a question in all respects like the one considered in Boyd *v.* United States (*supra*)."

In *Starchman* v. *State*, 62 Ark., 538, the defendant was on trial for burglarizing a safe which it was found had been drilled into and opened by means of an explosive. It was held to be competent for the State to introduce in evidence certain drills and punches capable of being used to open the safe, which were found by officers on defendant's premises while they were searching for the stolen property under a search warrant. *It is particularly noted that the search warrant called for stolen property, and that in the execution of it the punches and drills were found and seized and subsequently received in evidence against the defendant, though no claim was made that they formed any part of the stolen property.* The Court at page 540 said :

"In Boyd *v.* United States, 116 U. S., 616, cited by counsel for appellant, it was held that a defendant cannot be compelled to produce his private papers in order that they may be read in evidence against him upon a criminal prosecution, for the reason that to do so would in fact be compelling him to testify against himself. *But that case has no application here*, and rests on principles different from those controlling the admission of this evidence. No private papers of the defendant were introduced, and he was not compelled to produce the instruments offered in evidence in this case. *These instruments were found by the officers while searching for stolen property, and it was proper for such officers to testify concerning any material fact discovered by them while making such search.*" (Italics ours.)

So in the *State* v. *Flynn*, 36 New Hamp., 64, it was held that

> "Evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, *even if it appears that the search warrant was illegally issued.*" (Italics ours.)

In *Shields* v. *The State*, 104 Ala., 35, it was held, on the trial for carrying concealed weapons, where it was shown that a pistol was found concealed on defendant's person as the result of a forcible search by an officer, that the evidence of the discovery of the pistol was admissible against the defendant, *although the search was unauthorized and unlawful.* At page 38 the Court said:

> "While it is true, the search of the defendant was without legal justification, a trespass, and an indictable misdemeanor, we know of no principle or theory upon which the State may be deprived of the right to employ the evidence of a criminal offense thus obtained."

In *State* v. *Atkinson*, 40 South Car., 363, it was held, on the trial of the defendant for murder, that *certain papers taken from his room in his absence and without his authority could be used in evidence against him*, the Court stating, at page 371:

> "The question now presented for our decision is *not* whether the persons who found the pieces of paper in the room of the defendant John Atkinson violated any of his legal rights by entering his room without authority, but whether the papers there found could be offered in evidence in this case. For, while it may be possible that it was a technical trespass to enter his room without authority, yet

it does not by any means follow that the pieces of paper there found could not be offered in evidence."

The Court then quotes Greenleaf on Evidence, Volume 1, Section 254a, above referred to as an authority on the proposition that evidence illegally taken from the possession of the party against whom it is offered or otherwise unlawfully obtained may be used in evidence against him, and that its unlawful seizure is no objection to its admissibility.

In the well considered case of *Williams* v. *The State*, 100 Ga., 511, where the defendant was on trial for keeping open a tippling house on Sunday, the evidence showed that two officers went to the premises *without a search warrant*, took a purse from the defendant's apron pocket, examined the premises and found there certain wines and whiskeys. On the trial the Court ruled that the property so found and taken was competent, notwithstanding the objection that was taken that the seizure was in violation of the defendant's rights under the Constitution. The Court held substantially that although the search and seizure may have been unlawful, unwarranted, unreasonable and reprehensible, this did not affect the admissibility of the evidence obtained as a result thereof.

So in *State* vs. *Kaub*, 15 Mo. Ap., 433, it was held that the unlawful seizure of certain papers and the introduction of the same in evidence did not actually or in effect compel the defendant to testify against himself.

The case of *State* vs. *Flynn*, 36 N. H., 64, 71, briefly and clearly summarizes the reasoning of other cases on this point as follows:

"It seems to us an unfounded idea that the "discoveries made by the officers and their

"assistants, in the execution of process, "whether legal or illegal, or where they in- "trude upon a man's privacy without any "legal warrant, are of the nature of admis- "sions made under duress, or that it is evi- "dence furnished by the party himself upon "compulsion. The information thus acquired "is not the admission of the party, nor evi- "dence given by him, in any sense.

"The party has in his power certain mute "witnesses, as they may be called, which he "endeavors to keep out of sight, so that they "may not disclose the facts which he is de- "sirous to conceal. By force or fraud access "is gained to them, and they are examined to "see what evidence they bear. That evidence "is theirs, not their owner's."

In the case of *Ruloff* vs. *The People*, 45 N. Y., 213, the defendant was indicted for murder in the first degree.

Upon the trial it was developed that the defendant, in company with two other men, attempted burglary in the City of Binghamton, New York; that the occupants of the building in which the burglary was attempted resisted the three men attempting such burglary, and while so doing one of said occupants was killed. The three alleged burglars escaped; two of them were drowned in a river while making their escape. The third, Ruloff, was apprehended a day or two later. Certain burglars' tools were found near the scene of the burglary, and certain articles were found upon the bodies of the two deceased burglars, which tended to connect them with the defendant, and hence connect the defendant with the commission of the crime. It then became necessary for the prosecution to show the connection of the defendant Ruloff with the two deceased burglars. *Detectives visited his rooms at No. 170 Bowery in New York City, and there found certain burglars' tools, together with certain papers and articles in a desk,*

tending to fasten upon the defendant the occupancy and control of the room, and, as a matter of inference, to connect him with the burglars' tools in the room, which resembled and in some way corresponded with the tools found at the scene of the burglary in Binghamton.

Various articles taken from the room were offered in evidence by the prosecution and admitted; to which the defendant objected and excepted. The Court of Appeals sustained the conviction.

The point herein referred to was not argued at length by defendant's counsel, but the point was properly before the Court and was disposed of adversely to the defendant (see pages 223 and 224 of the opinion).

Moreover, a certain slip of paper found upon the body of one of the deceased burglars was shown by the prosecution to bear handwriting of the defendant. To this the defendant objected and excepted. And on this point also the Court sustained the ruling of the lower Courts.

Contention of Plaintiff in error.

(1.) The learned counsel for the plaintiff in error has cited a number of authorities which he contends support a doctrine adverse to that which has been laid down by those heretofore referred to. Of these authorities, four only present the question of the effect of the admission of proof which has been illegally obtained; the rest tend more or less directly and emphatically to support the doctrine that the seizure of private papers, with or without a search warrant, is an illegal act—a proposition which is sustained by all the authorities cited on our brief.

The four cases in which is considered the effect of the admission of evidence illegally obtained are the Boyd case, 116 U. S., 616, which has been so clearly

distingnished by the learned Judges from whose opinions we have quoted at length, that no further comment seems necessary; the case of United States *v.* Wong Quong Wong, 94 Federal Reporter, 832, in which Judge Wheeler, as we conceive, misconstruing the Boyd case, laid down a rule which seems to support the contention of the defendant.

The Shannon case (73 Vt., 212), and the Sheridan case (96 N. W. Rep., 730).

The Shannon case does hold that where papers are taken forcibly from the person of the prisoner, it is reversible error to admit these papers in evidence, thereby overruling the practice which has obtained universally and from time immemorial.

See authorities, *supra.*

The Iowa case, State *v.* Sheridan, 96 N. W. Rep., 730, points a very interesting distinction between the case of a seizure under color of process wholly void and an illegal seizure made either without any process or while engaged in executing valid process; ruling that in the latter case the matter seized is admissible since taken without color of right, while in the former case the abuse of governmental process renders the matter seized inadmissible.

Whether or not this distinction is sound, is a question not presented to this Court.

In the case at bar the search-warrant could not be found at the time of the trial, and is not in evidence, nor was any competent secondary evidence of its terms offered. Concededly a valid search-warrant could have been issued limited to a search for the policy papers, and in the absence of proof to the contrary, the presumption clearly is that any warrant that was issued was a legal one.

Leland *v.* Cameron, 31 N. Y., 115.
Manderville *v.* Reynolds, 68 N. Y., 534.

Deeming *v.* Supreme Lodge, 131 N.Y., 522.
Blackman *v.* Reilly, 138 N.Y., 318, 328.
Pillow *v.* Roberts, 13 How. U.S.), 472, 474.

It follows, therefore, that the seizure of the private papers not relating to the game of policy was, in the view of the Iowa Court, a naked trespass, and, under the view adopted by that Court, there was no bar to the admissibility in evidence of the papers thus seized.

(2.) The learned counsel for the plaintiff in error seeks to distinguish this long line of authorities by contending that in each of the cases cited the evidence adduced as a result of the illegal seizure, was in some sense evidence of the *res gestae.*

It is difficult to see wherein this would furnish a ground of distinction, if, in fact, the statement was justified, but as a matter of fact, the evidence admitted in many of the cases cited, was not of the *res gestae.*

We forbear a lengthy analysis and discussion of all the cases cited and criticized, and confine ourselves to the Van Wormer case. There that which was seized and forcibly taken possession of, was the shoes of the defendants. The use that was made of that evidence was to furnish a connecting link as to the *identity* of the person that committed the crime. Here, in precisely the same way the defendant's "private" papers are used as a connecting link to establish his *identity* as the owner of the contraband papers. Clearly, we submit, there is no possible ground of distinction between the Van Wormer case and the case at bar.

(3.) A further contention made by the counsel for the plaintiff-in-error in criticism of the authorities, upon which the State Courts relied is that

they tend to substitute physical force for the orderly administration of justice.

The answer to this contention is that it is generally conceded that, while the Courts may reprehend the exercise of illegal physical force in the effort to bring a criminal to justice, still the fact that such force has been used in a preliminary proceeding, has never been held to prevent the law from taking its course, and has always been regarded as a collateral issue and not the subject of inquiry on his trial. Thus the fact that a person has been brought within the jurisdiction either from a foreign country or from a sister State by the unlawful use of force, which would render the officer who took him in custody amenable to a civil action anywhere and to a criminal prosecution in the county or State where the forcible abduction took place, will not prevent the trial of the person who was abducted in the State into which he had been brought, and will not avail him as a defense upon that trial.

Ker *v.* Illinois, 119 U. S., 436.
Mahon *v.* Justice, 127 U. S., 700.

Yet clearly in such case the defendant has been deprived of his liberty without due process of law in a preliminary proceeding quite as clearly as it can be claimed that he has been subjected to an unreasonable seizure in the case at bar.

An yet this Court said :

> "The jurisdiction of the Court in which the "indictment is found is not impaired by the "manner in which the accused is brought be-"fore it."

Mahon *vs.* Justice, 127 U. S., 700, at p. 708,

Similarly, we submit in accordance with all authorities the right of the Court to consider evidence is not in any way affected by the illegal character

of the methods by which that evidence has been secured.

The contrary doctrine is based upon the assumption that the aim of the Fathers who provided our constitutional safeguards was to protect the criminal from the consequence of his crime, and that, therefore, it is violative of the constitutional right of the criminal to utilize for the purpose of his conviction any evidence that has been obtained against him illegally.

Manifestly such an assumption is without basis, and manifestly the rights recognized by the founders of our government are fully protected by a system of laws which accords a civil remedy even against the officers of the government for their invasion.

Clearly, too, if, by reason of his criminal conduct, a person is so circumstanced that the invasion of his rights leads to the discovery of evidence entailing criminal consequences for which there can be no redress in a civil action, "that", to quote the language of an eminent New York jurist used in a somewhat different connection, "is the mis-"fortune of his situation, and not any want of hu-"manity in the law."

POINT III.

Section 344a of the Penal Code is not in conflict with any of the provisions of the 14th Amendment to the Federal Constitution.

The act in question is part of a general scheme of legislation designed to discourage gambling within the State of New York.

Sec. 9 of Article 1 of the Constitution of the State forbids all forms of gambling and enjoins

upon the State Legislature the duty of carrying this inhibition into effect.

In furtherance of this constitutional requirement the Legislature has sought to discourage the particular form of gambling known as "policy", not only by prohibiting and making criminal the act of gambling itself, but by making it criminal knowingly to have possession of the instrumentalities wherewith it is conducted, or even the evidence of the completed gambling transaction.

Wherein it may be claimed that such an enactment exceeds the powers of the State Government it is difficult to perceive.

That the object of the statute is a public one such as to justify the exercise of the police powers in their broadest interpretation, is, of course, beyond question.

> "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries; the former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor, it plunders the ignorant and simple. In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone* v. *Mississippi*, 101 U. S., 814; *Douglas* v. *Kentucky*, 168 U. S., 488.
>
> *Lottery Case*, 188 U. S., 321, at p. 356.

That the means adopted to further that object are well within the limits of the police power is equally well settled.

The power of the State in furtherance of a public

purpose to declare criminal even that which in itself is innocent, and to prohibit the possession of even a useful article is settled beyond question. Thus it is established beyond controversy that the mere possession of fish or game or of the instrumentalities for their destruction may be proscribed and affected with criminal consequences.

Phelps v. *Racy*, 60 N. Y., 10.
People v. *Buffalo Fish Co.*, 164 N. Y., 93.
Lawton v. *Steele*, 152 U. S., 133, at p. 143.
Geer v. *Connecticut*, 161 U. S., 519.

A fortiori as to the power of the State to prohibit the possession of instrumentalities of gambling, or other noxious pursuits. Such a prohibition does not invade any right of property, since there can be no property in that which endangers the public morals.

Stone v. *Mississippi*, 101 U. S., 814.
Douglas v. *Kentucky*, 168 U. S., 488.

It does not invade any right of liberty, since that right, though embracing the privilege of pursuing any useful or harmless calling, does not embrace the privilege of dealing in that which will be confessedly injurious to public morals.

Lottery Case, 188 U. S., 321, at p. 357.

And so this Court has sustained as an exercise of the police power incidental to the Inter-State Commerce powers of the Federal Government, the Act of 1895, making it criminal to transport a lottery policy or even the advertisement of a lottery policyfrom one State to another.

Lottery Case, 188 U. S., 321.

Clearly, if the question were ever open to any doubt, said doubt has been set at rest by this decision.

POINT IV.

The question of the constitutionality of Section 344b was not raised in the State Courts in such manner as to permit a review in this Court.

The claim that the constitutionality of Section 344b is involved in the case, and that it is before this Court, is founded upon the fact that instructions upon the presumption of *scienter* flowing from possession, were given to the jury by the trial Court, without objection on the part of counsel for the defendant (plaintiff in error).

In the absence of such an objection and exception the Court of Appeals was without jurisdiction to review the propriety of the instructions, for even if the statute were unconstitutional, the case before them stood precisely as though, in the absence of any statute, a Judge presiding at a trial had instructed the jury erroneously and the counsel for the prisoner had failed to except.

People vs. *Grossman*, 168 N. Y., 47.
People vs. *Sherlock*, 166 N. Y., 180.
People vs. *Brooks*, 131 N. Y., 321.
People vs. *Most*, 128 N. Y., 113.
People vs. *Donovan*, 101 N. Y., 63.
People vs. *Guidici*, 100 N. Y., 503.

And the Court has so held in its opinion herein.

> "The learned trial Judge in charging the jury called their attention to the statute and explained its application and limitations. To this charge no exception was taken and the question of the constitutionality of this section therefore is not presented." .(p. 117).

It is true that the Court then proceeded to discuss the question of constitutionality and to express an opinion upon that question, which will doubtless hereafter be controlling upon the lower

courts, and will result in an affirmance of a judgment, even though the question be raised.

But since under the statutes of the State of New York the Court of Appeals was without *power* to reverse in this case, even though it deemed the statute unconstitutional because of the failure of the plaintiff in error to take the proper means of raising the question, we submit that the question is not before this Court.

Spies vs. *Illinois*, 123 U. S., 131, 181.
Chappell v. *Bradshaw*, 128 U. S., 132, 133.
Morrison v. *Watson*, 154 U. S., 111, 115.
Miller v. *Cornwall Rd. Co.*, 168 U. S., 131.

"To give this Court jurisdiction to review "the judgment of the State Court under Sec. "709 of the Revised Statutes because of the "denial by a State Court of any title, right, "privilege or immunity claimed under the "Constitution or any treaty or statute of "the United States, it must appear on the "record that such title, right, privilege or im- "munity was 'specially set up or claimed' "at the proper time in the proper way. "'To be reviewable here,' says Waite, "C. J., in *Spies* v. *Illinois*, 123 U. S,. "131, 181, 'the decision must be against the "right *so set up or claimed*. As the Supreme "Court of the State was reviewing the decision "of the trial Court it must appear that the "claim was made in that Court because the "Supreme Court was only authorized to review "the judgment for errors commited there, and "we can do no more.'"

Chappell v. *Bradshaw*, 128 U. S., 132, 133.

POINT IV.

Section 344-b of the Penal Code is constitutional.

As to the constitutionality of Section 344-b, two points are made: First, that it was beyond the power of the Legislature to make the possession *prima facie* evidence that the possession was conscious; second, that the exception of public officers from the operation of the section renders it class legislation.

A.

The provision making proof of possession prima facie proof that the possession was conscious is constitutional.

We conceive it to have been conceded whenever the question has been raised (1) that the Legislature may, with some limitations, enact that when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question.

(2) That the limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary or wholly unreasonable, unnatural or extraordinary.

(3.) And that the connection between the fact proven and the fact in issue need not be that of inevitable inference, nor need the fact inferred be one which is within the exclusive knowledge of the person against whom the inference is drawn.

Peo. *vs.* Cannon, 139 N. Y., 32.

These principles have been universally accepted.

Cooley's Const. Lim., pp. 367–369.
State *v.* Cunningham, 25 Conn., 195.
Wooten *v.* Florida, 1 L. R. A., 819 (Fla., 1, 888).
Com. *v.* Williams, 6 Gray (72 Mass.), 1.
State *v.* Hurley, 54 Me., 562.
State *v.* Higgins, 13 R. I., 330.
State *v.* Mellor, 13 R. I., 666, 669.
Com. *v.* Kelly, 10 Cush. (64 Mass.), 69.
Com. *v.* Tuttle, 12 Cush., 502.
Meadowcroft *v.* People, 163 Ill., 56.
State *v.* Buck, 120 Mo., 479.
State *v.* Beach, 36 L. R. A., 179 (Ind., 1897).
Morgan *v.* State, 117 Ind., 569.

The Federal Criminal Code includes numerous *prima facie* evidence provisions similar to the one here under discussion.

In Section 5495 it is provided that the failure of any person charged with the safekeeping or disbursement of public moneys to pay a draft, order, or a warrant drawn upon him by the proper accounting officer of the treasury for any public money in his hands, shall be deemed upon the trial of any indictment against such person for embezzlement as *prima facie* evidence of such embezzlement.

And the constitutionality of this provision has never, so far as we can find, been questioned.

In Section 3082 of the U. S. Revised Statutes it is provided that whenever on the trial of an indictment for fraudulently importing goods, etc., the defendant is shown to be or to have been in possession of the smuggled goods "such possession shall be deemed evidence sufficient to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury".

The constitutionality of this provision never seems to have been questioned nor has it ever been

considered that such provisions impair the right of trial by jury (Tilley *vs.* Savannah Ry. Co., 5 Fed. Rep., 641, 659).

Moreover, it has been laid down broadly by this Court that it is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence in the Courts of its own government.

Fong Yue Ting *v.* U. S., 149 U. S., 698, 729.

Marks *v.* Hanthorn, 148 U. S., 172, 182.

Pillow *v.* Roberts, 13 How. (54 U. S.), 472, 476.

Ogden *v.* Saunders, 12 Wheat. (25 U. S.), 212, 348.

For the purpose of the case at bar, it is not necessary, however, to argue in favor of an unlimited power to prescribe rules of evidence. Conceding that power to be subject to the limitations set forth in the opinion of Judge Peckham in the case of the People *v.* Cannon (*supra*), we submit that it is difficult to conceive of an inference more natural and more in accord with common experience than that a person knows what articles are in his possession, and, therefore, that it is difficult to conceive of an inference which comes more completely within the definition and limitations of the power as laid down by the Courts.

B.

Section 344b is not Class Legislation.

The point is made by the counsel for the plaintiff in error that Section 344b is void because it applies a different rule to public officers than that which is applied to other persons; that this is class legislation, and that there can be no justification

for exempting a notary public from the same rules of evidence that are applicable to other persons.

People *v.* Cannon, 139 N. Y., 32.
People *v.* Stedeker, 175 N. Y., 57.

A literal construction of the statute might, perhaps, have furnished some ground for this contention. But the statute has been construed by the highest Court of the State to exempt public officers only when their possession is by virtue of their office and in the performance of official duties.

See Opinion, p. 118 of this record.

So construed, it is simply a recognition of the rule of law which would, in any event, exempt an officer from liability for the possession of the article, because his possession would be without the element of criminal intent.

People *v.* Noelke, 29 Hun, 461, 466.
People *v.* Noelke, 94 N. Y., 137 (s. c. affirmed).

IN CONCLUSION

It is respectfully submitted that the judgment of the New York Courts should be affirmed.

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